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No. 75-948

# In the Supreme Court of the United States

OCTOBER TERM, 1975

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MARTIN C. CALAWAY, ET AL., PETITIONERS

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

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## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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ROBERT H. BORK,
*Solicitor General,*
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Petitioners contend that (1) the court of appeals improperly denied additional time to file their briefs and limited oral argument; (2) they were prejudiced by the behavior of the Assistant United States Attorney; (3) the procedure employed by the district court in excusing jurors for personal hardship violated Fed. R. Crim. P. 43; (4) the district court erred in admitting certain hearsay testimony; (5) they were tried under the wrong conspiracy statute; and (6) there was insufficient evidence to support their convictions.

Following a jury trial in the United States District Court for the Central District of California, petitioners were convicted of conducting an illegal gambling business, in violation of 18 U.S.C. 1955, and of conspiracy to conduct that offense, in violation of 18 U.S.C. 371. In addition, petitioner Vaccaro was convicted of interstate

travel in aid of the gambling business, in violation of 18 U.S.C. 1952. Each petitioner was sentenced to concurrent terms of four years' imprisonment on each count. The court of appeals affirmed (Pet. App. 1-13).

The evidence showed that in 1971, petitioners carried on an illegal gambling business involving the games of blackjack and craps. Petitioners Vaccaro and Calaway and others initially planned to establish the business in a restaurant partially owned by Calaway (Tr. 289-295, 300-303, 754-777). Thereafter, Vaccaro enlisted the assistance of indicted co-conspirator Coloduros and others in obtaining additional financing. Vaccaro also enticed petitioner Gelfuso into the scheme (Pet. App. 4; Tr. 1983-1991).

Gelfuso and Vaccaro agreed that Gelfuso would find a location and furnish customers and security for the games (Tr. 1983-1991). In return, Gelfuso and co-defendant Milano were each to receive 20 percent of the profits, with Vaccaro, Calaway and unindicted co-conspirator Dubeck dividing the remainder (Tr. 1992-1995). Calaway, an attorney, was to provide free legal services to the partners, if necessary (Pet. App. 5; Tr. 467-472, 519-522). He also provided part of the money to start the operation (Tr. 2455-2464, 2535-2536).

The illicit games commenced in a private house and remained there for several weeks (Tr. 2539-2560). Large sums of money were wagered in the games, and at least one customer lost in excess of $2,000 in a single day (Tr. 429-431). Although the games moved from place to place to avoid detection, it was ultimately raided and broken up by the local police (Pet. App. 4-5).

1. Petitioners contend (Pet. 7) that the court of appeals' refusal to extend the time for filing their original brief, to permit the late filing of a supplemental brief, and



to give the appellants[1] more than 30 minutes for oral argument deprived them of the effective assistance of counsel on appeal.

The decision whether to allow additional time for filing briefs or to receive a brief after argument is within the discretion of the court of appeals, and petitioners have not shown that the court abused its discretion in not departing from its usual practice in this case. The supplemental brief that petitioner Calaway sought to file 22 days after the case was argued raised two additional legal arguments not discussed in the original briefs.[2] Calaway has offered no justification for his failure to include those two issues in the brief he originally filed—issues which, because they involved purely legal questions, did not require detailed analysis of the 3,000-page trial transcript.[3]

2. Petitioners claim (Pet. 8-9) that the prosecutor intentionally asked a government witness a question that he knew would elicit inadmissible and highly prejudicial testimony.

Anticipating impeachment by the defense, the prosecution asked two of its witnesses on direct examination

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[1]Defendants Milano and Endreola have not sought review of the affirmance of their convictions.

[2]These issues are the fourth and fifth questions presented in the petition (Pet. 10-16).

[3]Similarly, the court of appeals did not abuse its discretion in denying additional time for oral argument. Since the court of appeals is not required to hear oral argument at all (*Price* v. *Johnston*, 334 U.S. 266, 286; *George W. Fennett Bryson & Co.* v. *Norton Lilly & Co.*, 502 F.2d 1045 (C.A. 5); see *Federal Communications Commission* v. *WJR, the Goodwill Station, Inc.*, 337 U.S. 265), it was within the court's discretion to limit each side to the usual 30 minutes.

whether there were any charges pending against them and whether any promises had been made in exchange for their testimony. One witness responded that the government had promised to relocate him and give him a new identity, the answer the government anticipated. Witness Ernstsen replied (Tr. 860):

> You told me that the only promise you would make to me is that after this trial was over and as long as I was in the custody of the United States Government you would see that I was kept alive.

The court of appeals found that this answer surprised the prosecution (Pet. App. 11-12) and that the witness had been specifically instructed to say nothing about threats to his safety (Pet. App. 12). The court also found that the government had anticipated that the witness would testify that it had promised to disclose his cooperation to any judge before whom he would appear for sentencing (*ibid.*).

The prosecutor acted properly in asking the witnesses a question designed to anticipate adverse testimony that the defense was likely to bring out on cross-examination. The court of appeals suggested that it might have been better "to leave it to defense counsel to make the difficult tactical decision whether to risk a potentially prejudicial answer in quest of impeachment" (Pet. App. 11). But because of the possibility that the failure of the prosecution to disclose to the defense agreements with witnesses affecting their motivation to testify may violate its duty of disclosure under *Brady* v. *Maryland*, 373 U.S. 83,[4] it is proper for the prosecu-

[4]See *United States* v. *Gerard*, 491 F.2d 1300 (C.A. 9); *Giglio* v. *United States*, 405 U.S. 150.



tion to elicit possibly impeaching testimony on direct examination. There is no basis for petitioners' contention that the question the prosecutor asked Ernstsen about any benefits promised in exchange for his testimony was designed to elicit prejudicial inadmissible testimony.

Moreover, as the court of appeals correctly held, although the witness's response was potentially prejudicial, the record contains overwhelming evidence that petitioners Vaccaro and Gelfuso were guilty (Pet. App. 12). The evidence of petitioner Calaway's guilt was equally compelling (Pet. App. 4-5, 7-8). Therefore, any error resulting from the prosecutor's conduct was harmless (Pet. App. 12). See *Chapman* v. *California*, 386 U.S. 18, 23-24.

3. Petitioners contend (Pet. 9-10), without supporting authority, that the trial court's manner of excusing jurors for hardship violated Fed. R. Crim. P. 43 and thereby deprived them of due process of law. That Rule requires that the defendant be present "at every stage of the trial, including the impaneling of the jury." Here, the court anticipated difficulty in selecting an impartial jury because of adverse publicity (Tr. 87-89). It therefore instructed the jury clerks to assemble all available prospective jurors in the courtroom.

The court told them nothing about the case except that the jury would be sequestered for a period of approximately two or three weeks during the trial. He asked anyone who felt that such service would be a personal hardship to pass before the bench for a brief conversation (Tr. 88-89). A number of prospective jurors did so and were excused. Their conversations with the judge were not recorded and were inaudible to counsel and defendants, and petitioners contend that their inability to hear the conversations violated the Rule. The court of appeals properly found, however, that (Pet. App. 10):

> The eminently practical procedure employed by the trial judge cannot reasonably be considered a part of the criminal trial. Ordinarily it falls to the jury clerks or commissioners to excuse jurors for hardship, a practice that has been approved by the courts. * * * Surely the fact that this time the excusing was done by a judge sitting in his courtroom does not alter the essential nature of what was done * * * .

See *United States* v. *Woodner*, 317 F.2d 649, 651 (C.A. 2), certiorari denied, 375 U.S. 903.

4. Petitioners contend (Pet. 10-14) that they were denied due process of law and the right to confront the witnesses against them because the trial court improperly admitted hearsay evidence on the substantive counts which was admissible only on the conspiracy count. This issue was first raised in the untimely supplemental brief rejected by the court below and therefore is not properly before this Court. See *Lawn* v. *United States*, 355 U.S. 339, 362, n. 16.

In any event, these hearsay declarations of co-conspirators would have been admissible even had petitioners been indicted only on the substantive counts, since there was independent proof that they were engaged in a joint criminal enterprise. See, *e.g.*, *United States* v. *Smith*, 519 F.2d 516, 518-519 (C.A. 9); *United States* v. *Snyder*, 505 F.2d 595 (C.A. 5), certiorari denied, 420 U.S. 993. Therefore, these statements were admissible to prove both the substantive counts and the conspiracy charge in a unitary trial.

Contrary to petitioners' suggestion (Pet. 13), the district court has broad discretion to admit hearsay statements of co-conspirators prior to proof of the existence of the conspiracy, subject to the testimony subsequently



being "connected up" by independent proof of a joint criminal venture. See, *e.g.*, *Brinlee* v. *United States*, 496 F.2d 351, 354 (C.A. 8); *United States* v. *Jimenez*, 496 F.2d 288, 291 (C.A. 5), certiorari denied, 420 U.S. 979. The court of appeals found overwhelming independent proof that the charged conspiracy existed (Pet. App. 2).[5]

5. Petitioners contend (Pet. 15-16) that since Congress has enacted a special statute, 18 U.S.C. 1962(d), proscribing conspiracy to violate 18 U.S.C. 1955, their conviction under the general conspiracy statute, 18 U.S.C. 371, was improper.

This argument—also first made in the supplemental brief which the court of appeals refused to receive—was not timely presented to that court and therefore is not properly before this Court. *Lawn* v. *United States*, *supra*. In any event, this claim is specious, since Section 1962(d) covers only conspiracies to violate 18 U.S.C. 1962(a), (b) or (c). In the absence of a special statutory provision, the general conspiracy statute governs. Petitioners were thus properly convicted under Section 371.

6. Relying on the fact that 18 U.S.C. 1955 applies only if five or more persons are involved in a gambling business, petitioners argue (Pet. 16-17) that their convictions cannot stand because there was insufficient evidence to support the conviction of co-defendant Milano.[6] They

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[5]Petitioners' reliance (Pet. 14) on *Bruton* v. *United States*, 391 U.S. 123, is misplaced. The federal co-conspirator hearsay exception does not violate the Confrontation Clause. *E.g.*, *United States* v. *Everidge*, 448 F.2d 1, 3 (C.A. 9); *Ottomano* v. *United States*, 468 F.2d 269, 273 (C.A. 1), certiorari denied, 409 U.S. 1128; see *Dutton* v. *Evans*, 400 U.S. 74, 89.

[6]As noted in n. 1, *supra*, Milano has not sought review of his conviction in this Court.

contend that had the jury properly acquitted Milano, it is uncertain that it would have found that five or more persons were involved in the gambling business (Pet. 17).

The record shows, however, that, apart from Milano, at least five persons were involved in the gambling scheme. In addition to the three petitioners, codefendants Coloduros and Endreola, and unindicted co-conspirator Dubeck were, as the court of appeals recognized (Pet. App. 4-5, 7, 9), also principal operators of the gambling scheme.[7] The jury was properly instructed that to convict, they must find beyond a reasonable doubt that each defendant "and at least four other persons" knowingly, willfully and intentionally were involved in the gambling operation (Tr. 3430). The record supports the jury's conclusion that at least five persons were involved in this gambling scheme.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
*Solicitor General.*

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[7]Coloduros' trial was severed. Dubeck and his wife were shot to death just before the trial of this case began (Pet. App. 4).